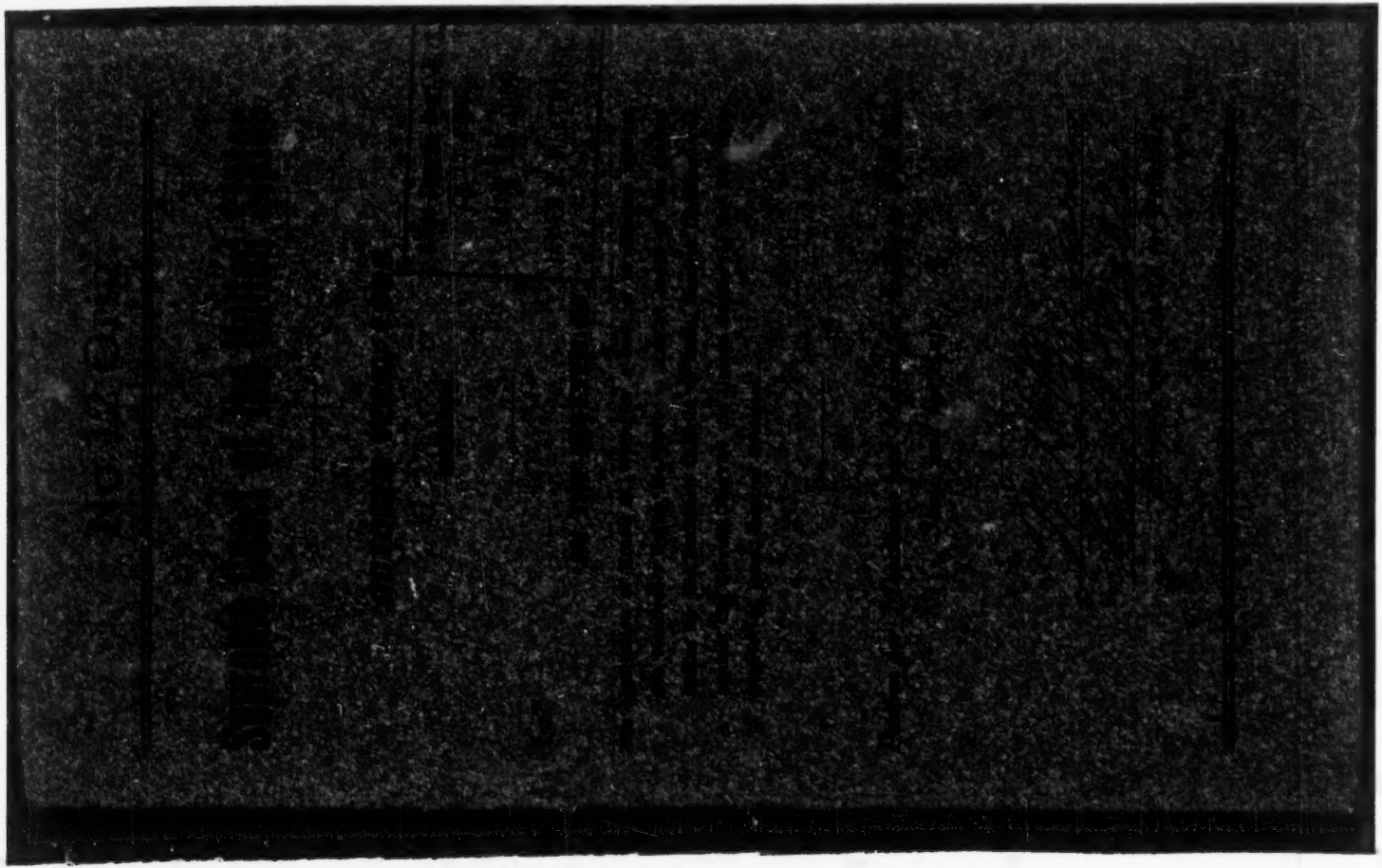


In the

Supreme Court of the United States

IN THE MATTER OF

Application of Frank D. Winn for a writ of mandamus against the Honorable Smith McPherson, District Judge of the United States for the Southern District of Iowa, Central Division, and against the Circuit Court of the United States for the Southern District of Iowa, Central Division.

To the Honorable Melville W. Fuller, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Now comes the petitioner, Frank D. Winn, and moves for leave to file the petition for writ of mandamus hereto annexed, and moves further, that a rule be entered and issue directing the Hon. Smith McPherson, District Judge of the United States for the Southern District of Iowa, Central Division, and directing the Circuit Court of the United States, for the Southern District of Iowa, Central Division, to show cause why a writ of mandamus should not issue against them, and each of them, in accordance with the prayer of said petitioner, and why said petitioner should not have such other and further relief in the premises as may be just and meet.

W. N. Brenner

Guy A. Miller

Attorneys and Counsel for Petitioner.

In the
Supreme Court of the United States

IN THE MATTER OF

The application of Frank D. Winn, for a writ of mandamus against the Hon. Smith McPherson, District Judge of the United States, for the Southern District of Iowa, Central Division, and against the Circuit Court of the United States, for the Southern District of Iowa, Central Division.

To the Honorable Melville W. Fuller, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petition of Frank D. Winn, who is a resident of Randolph, in Clay County, State of Missouri, respectfully shows:—

I.

That your petitioner, Frank D. Winn, on the 28th day of May, A. D. 1908, filed in the District Court of the State of Iowa, in and for Polk County, at Des Moines, Iowa, a certain suit, numbered therein 17325, Law, wherein he was Plaintiff, and the American Express Company was Defendant.

II.

(Original Petition Filed in State Court.)

That the said petition of plaintiff therein filed was in words and figures as follows, to wit:—

IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR POLK COUNTY.

SEPTEMBER TERM, A. D., 1908.

"Frank D. Winn,

Plaintiff. In Law. No. 17325.

vs. Petition.

The American Express Company,

Defendant.

The plaintiff, for cause of action against the defendant, states:—

That the defendant is a corporation organized under and existing by virtue of the laws of the State of New York, and doing business as a common carrier in the County of Polk, State of Iowa.

That on the 30th day of August, A. D. 1907, J. J. Ward and B. P. Smith, both of Belleville, Kansas, were the absolute owners of a certain boar named "Statesman," and that the said J. J. Ward had the said boar on exhibition at the Iowa State Fair, in Des Moines, Iowa, on the said date.

That on the 30th of August, A. D., 1907, at the close of the said Iowa State Fair, the said J. J. Ward entered into a written contract with the said American Express Company, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof, for the transportation of the said boar from Des Moines, Iowa, to Lincoln, Nebraska.

That on the said date by virtue of the said written contract, the said J. J. Ward delivered the said boar to the American Express Company, at the State Fair Grounds, in Des Moines, Iowa, advising the company at that time that the said boar was a very valuable one, and that he was to be shipped to Lincoln, Nebraska, the said company well knowing that the said boar was a very valuable one.

That the said American Express Company agreed to haul the said boar to the Lincoln car, in a single covered wagon, by himself. That when the said J. J. Ward delivered the said boar to the said Express Company, the said company loaded the said boar in a transfer wagon, with nine other crated hogs. That the said Express Company placed one crate in front of, another crate on top of, and one crate on each side of the said boar Statesman, completely cutting off the circulation of air from him. That the night of the 30th of August, A. D. 1907, was a very hot one, and that the boar, a short time after he was loaded, began to suffer greatly with the heat.

That the said boar at the time he was delivered to the said Express Company, was in good sound condition.

That the said wagon containing the said boar was driven by the driver to the office of the said Express Company, and that the said driver selected the roughest route over which to haul the said boar. That the said driver of the wagon did drive the same across many railroad tracks on the way to the express office, and when he arrived there he was ordered to take the said boar to the Lincoln car and unload him therein.

That the said driver recrossed the said tracks and proceeded to the Lincoln car. That he was told that he could not unload the said hog there; that the said wagon and the hogs therein were driven back across the said tracks to the office of the said Express Company, whereupon the driver reported for further orders. That at this time the said J. J. Ward entered the said office of the Express Company and asked those in charge if they could not help him get the boar unloaded, and further told them that the boar was a very valuable one, and that the said boar was suffering greatly with the heat. That the said parties in charge of the said office told the said J. J. Ward that they could do nothing for him.

That thereupon the said driver of the said wagon was instructed to haul the said boar across the said tracks and unload him on a truck. That the said driver did recross the said tracks and unloaded the said boar upon a truck, and that five minutes after the said boar was unloaded he was dead. That the said American Express Company did negligently load the said boar in the said transfer wagon with the nine other hogs. That the said American Express Company did negligently load the said hogs so as to shut off the free circulation of air from the said boar, "Statesman."

That the said American Express Company did negligently drive the said wagon with the said boar therein over a very rough route, there being a much better and smoother route they could have selected. That the said American Express Company did negligently handle the said boar from the time they received him until he was unloaded, five minutes before his death, and failed wholly to use any care whatever with the said boar.

That the driving in a careless manner over the rough roads and across the said railroad tracks many and divers times, did greatly shake up, jolt, and jostle the said boar, and did heat up the said boar to a dangerous temperature.

That the said J. J. Ward was free from all contributory negligence whatever.

That the said American Express Company by their said negligence, caused the death of the said boar. That the reasonable value of the said boar Statesman, at the time of his death, was Eight Thousand Dollars and that the said J. J. Ward, and B. P. Smith, owners of the said boar, were damaged by the negligent killing of the said boar on the part of the said American Express Company, in the sum of Eight Thousand Dollars.

That the said J. J. Ward, and B. P. Smith have assigned to the plaintiff, Frank D. Winn, in writing, all their right,

title, and interest in and to the said claim of action against the said American Express Company, a copy of which assignment is hereto attached, marked "Exhibit B" and made a part hereof.

That the said J. J. Ward, B. P. Smith, nor this plaintiff, neither jointly nor severally have received anything for their said damage, and the entire amount is now due and unpaid.

Wherefore plaintiff, Frank D. Winn, demands judgment against the American Express Company, in the sum of Eight Thousand Dollars with interest thereon at the rate of six per centum per annum from August 30th., 1907, together with the costs of this action.

Signed. FRANKLIN & MILLER,
Attorneys for Plaintiff."

"EXHIBIT A".

NOTICE TO SHIPPERS. The shipper will value his stock, which valuation will be inserted in the contract, and the charge for carriage and any liability for damage will be based on such valuation.

AMERICAN EXPRESS COMPANY-LIMITED LIABILITY LIVE STOCK CONTRACT. (69) Aug. 5.

(In Duplicate.)

This contract made at the Fair Grounds, Des Moines, Iowa, this 30th day of August, 1907, between American Express Company, of the first part, hereinafter called the Express Company, and J. J. Ward, hereinafter called the Shipper, party of the second part.

1. Witnesseth: that the Express Company undertakes to forward to the nearest point to destination reached by it

(or if destined to a point beyond its lines, to forward to transfer point convenient to destination, and there deliver to connecting carrier to complete the transportation), the animals hereinafter mentioned, of which the shipper declares himself to be the owner (or duly authorized agent of the owner), to wit:

(Enter on following lines, in words, not figures, the number and the kind of animals or birds.)

One Hog crated, consigned to J. J. Ward, at Lincoln, Neb., for the sum of _____dollars and _____cents which charge is fixed by and based upon the value of said animals as declared by the shipper, as hereinafter mentioned. Est 5.50.

2. And in consideration of the premises, said parties agree:—that the shipper, before delivering the said animals to the said Express Company, demanded to be advised of the rates to be charged for the carriage of the said animals as aforesaid, and thereupon was offered by said Express Company alternative rates proportioned to the value of the said animals, such value to be declared and fixed by the shipper, and according to the following tariff of charges, viz.:—

(Enter below in all cases what the express charges are or would be at the values specified in paragraph three.)

3. For Horses, Jacks, or Mules of a value not exceeding $75.00 ea. _____ _____ _____$_____

For Bulls, Burrows, Calves, Colts, Cows, Deer, Dogs, Elks, Goats, Hogs, Ponies, Sheep, Steers, or animals not otherwise specified, of a value not exceeding $50.00 each _____ _____ _____ _____$10.10.

For Cats, Ferrets, Guinea Pigs, Rabbits, Fancy Pigeons, or Fancy Fowls, or other Live Fowls, Birds, or Reptiles of a value not exceeding $5.00 each _____$_____

For a carload of Horses, Jacks, or Mules, of a value not

exceeding $75.00 for each animal ----------$——

For a carload of Bulls, Burrows, Calves, Colts, Cows, Deer, Dogs, Elks, Goats, Hogs, Ponies, Sheep, Steers or animals not otherwise specified, of a value not exceeding $50.00 for each animal----------$——

4. And the said parties further agree that any excess value declared by the shipper, over and above the limit fixed by the company's rate, is to be charged for, in addition to the above mentioned charge, according to the following schedule, to wit:—

When the merchandise rate of the company between the points of shipment of animals is	The additional chg. for excess value is
Not over $1.00 per 100 lbs----------	5% on excess valuation.
Over $1.00 per 100 lbs. and not over $2.00 per 100 lbs.	7% on ex. Val.
Over $2.00 per 100 lbs. and not over $3.00 per 100 lbs	10% on ex. Val.
Over $3.00 per 100 lbs. and not over $5.00 per 100 lbs	12% on ex. Val.
Over $5.00 per 100 lbs----------	15% on ex. Val.

5. The shipper, in order to avail himself of said alternative rates and in consideration thereof, being asked by the said Express Company to value the said property, now declares the value hereinafter mentioned to be the true values of said animals so to be shipped, as follows, to wit:— (Number and kind.) One Hog crated. Value each $50.00.

(Shipper must in all cases be required to declare value.)

6. The shipper agrees that the responsibility of the Express Company shall be that of a forwarder only and not that

of a common carrier, and that the Express Company shall not be liable for the conduct or acts of the animals to themselves, or which result from their propensities or natures, such as biting, kicking, goring or smothering, nor for loss or damages arising from the condition of the animals themselves, which risks are assumed by the shipper. The shipper hereby releases and discharges the Express Company from all liability from delay, injury to or loss of such animals from any cause whatever, unless such delay, injury, or loss shall be caused by the negligence of the agents, employees of the Express Company, and in such event the Express Company shall be liable to the extent of the actual damage to the animal or animals injured, which shall in no event exceed the sum herein declared by the shipper to be the true value thereof; and for the purpose of ascertaining or assessing such damage whether the same be a total or partial loss, the value of said animals, as herein declared by the shipper shall be conclusively deemed to be the true value thereof.

7. If any sum of money besides the charges for transportation is to be collected from the consignee on delivery of the said animals, and the same is not paid at once, the shipper agrees that the Express Company at its option, may retain said animals with ordinary and reasonable care, at the risk and expense of the shipper, or may return same to the shipper, the shipper to pay transportation charges both ways and all other expenses, and it is understood that the conditions of this contract shall apply to any such returned shipments.

8. The shipper agrees to load, tranship, and unload said animals at his own risk, and during the transportation thereof, to unload and load the said animals whenever the same may be necessary or required, at his own risk, and to furnish the necessary laborers therefor; and further agrees to cause

the necessary attendants to accompany and take charge of said animals, the Express Company furnishing free transportation for the attendants who have signed the attendants' contract appended hereto, and also furnishing laborers to assist in loading and unloading said animals, at the point of shipment and destination, such attendants and laborers not to be regarded, deemed or taken to be the agents of the Express Company for any purpose whatever, but, on the contrary, such attendants and laborers shall be deemed and taken to be the agents of the shipper.

9. Upon the arrival of the said animals at destination, the shipper or consignee shall forthwith receive said animals and pay the charges due thereon, and if for any cause the shipper or consignee shall fail or refuse to duly receive the same and pay any charges, then the Express Company, or the connecting carrier having the animals in charge, may as the agent of the shipper, have such animals put and provided for in some suitable place at the cost and risk of the shipper or consignee, and at any time or times thereafter may sell the same or any number of them, at public or private sale, with or without notice as the said agent may deem necessary or expedient, and apply the proceeds arising therefrom, or so much as may be needed, for the payment of any freight or charges that may be due, and other necessary and proper costs and expenses.

10. All the stipulations and conditions in this contract shall inure to the benefit of and extend to each and every carrier, Railroad Company, Express Company, Forwarder, firm, corporation, or person to whom the Express Company may entrust or deliver said animals for transportation, and shall define and limit the responsibility and liability therefor of any such company or person for the acts of their agents or employees.

11. The shipper agrees that in no event shall the Express Company be liable for any loss or damages unless the shipper shall, within thirty days after such loss or damage occurs, give notice in writing of his claim therefor to the Express Company, and that any suit against the Express Company for the recovery of loss or damage to the property herein specified shall be commenced within six months next after such loss or damage shall have accrued, or be forever barred, and should any suit be commenced against the Express Company after the expiration of the said six months, the lapse of time shall be taken as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding, and there shall be no waiver of the aforesaid time within which said claim shall be made, or within which suit shall be commenced, unless the Express Company expressly agree in writing to waive the same, and the shipper hereby so expressly stipulates and agrees. It is further agreed that any question arising under this contract shall be determined by the law of the State of New York.

Signed in duplicate. AMERICAN EXPRESS COMPANY.
By W. E. King, Agent.
Party of first part.
J. J. WARD,
(Owner or duly authorized agent.)
Party of the second part.

"EXHIBIT B".

ASSIGNMENT OF CAUSE OF ACTION.

We, J. J. Ward and B. P. Smith, being owners of a claim and cause of action against the American Express Company, growing out of their careless and negligent handling of our Poland China Boar, known as Statesman, placed in the hands of the said Express Company by us during the close of the

Iowa State Fair, at Des Moines, Iowa, in the fall of the year 1907, said careless and negligent treatment and care of said Poland China Boar, Statesman, by said Express Company at Des Moines, Iowa, at said time, resulting in the death of the said boar, for a valuable consideration, to us in hand paid by Frank D. Winn, the receipt whereof is hereby acknowledged, do hereby sell, assign, transfer, and set over to the said Frank D. Winn, all of our claim and right and cause of action against the said American Express Company, or any other express company, corporation, or person, growing out of its carelessness or negligence, resulting in injuries to, and the death of, the said boar Statesman, and we grant and assign to the said Frank D. Winn all our rights in the premises, including the right to maintain and institute such action or cause of action against the said American Express Company, or such other express company, corporation or person, that may be chargeable and liable for the death of the said boar, Statesman, as may be meet and proper, and to maintain such action in his own name.

Signed and delivered at Bellville, Kansas, on this 16th day of May, A. D. 1908.

Signed. J. J. WARD,
B. P. SMITH.

State of Kansas,

ss

County of Republic.

Be it remembered that on this 16th day of May, 1908 before me N. J. Ward, a notary public in and for said state and county, personally appeared J. J. Ward and B. P. Smith, to me personally known to be the identical persons named in and who executed the foregoing assignment of claim and cause of action to Frank D. Winn, and they did separately

acknowledge to me that they executed the same as their free and voluntary act and deed for the purposes therein stated.

Signed. N. J. WARD.

Notary Public in and for said County.

My Commission expires the 26th day of Sept. A. D. 1911.

SEAL

III.

Your petitioner further shows that the said defendant was duly served with an original notice of the said cause of action, citing it to appear in said court and make defense thereto. That within the time required by law the said defendant filed in the said District Court of Iowa in and for Polk County, a petition to remove said cause from the said District Court to the Circuit Court of the United States for the Southern District of Iowa, Central Division. That said petition for removal is as follows:

PETITION FOR REMOVAL.

In the District Court of the State of Iowa in and for Polk County.

"Frank D. Winn, *Plaintiff*,)
vs.)
American Express Company, *Defendant*.)

PETITION FOR REMOVAL TO THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

Your petitioner, the American Express Company, respectfully shows that it is the defendant in the above entitled suit,

and that the matter and amount in dispute in the said suit exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars ($2000.00).

That your said petitioner was, at the time of the bringing of this suit, and still is a joint stock association organized under the laws of the State of New York in such cases made and provided, and that the plaintiff was then and still is a citizen of the State of Missouri.

Your petitioner further shows that the said suit is one of a civil nature in which the plaintiff seeks to recover from the defendant the sum of Eight Thousand Dollars ($8000.00) as damages on account of an alleged failure on the part of the defendant to comply with its obligations as a common carrier in the shipment and transportation of a hog which the assignor of plaintiff offered to the defendant and which the defendant received from the assignor of plaintiff on or about the 30th day of August, A. D. 1907, for transporation from the State Fair Grounds at Des Moines, in the State of Iowa, to the City of Lincoln in the State of Nebraska.

That the defendant denies that it failed in any respect to perform its obligations with reference to the transportation of the said hog, and denies that it is liable upon the claim set up in the said suit, in any amount, and denies that, in any event, its liability could exceed the sum or value of fifty dollars ($50.00).

That the said suit is one arising under the laws of the United States. That your petitioner is, and was, at all of the times mentioned in the petition in this suit, a common carrier engaged in trade and commerce between the several states of the United States, and between the territories thereof, and between the territories and the several states.

That at the date of the shipment in question your petitioner was, and ever since that time has been subject to the provisions of the act of Congress, entitled "An Act to

Regulate Commerce", approved February 4, 1887, and of the acts of Congress amendatory thereof, and supplementary thereto, and that the alleged cause of action set up in said suit is based upon, grows out of, and necessarily involves the construction of said acts of Congress. That among the questions arising under said acts and necessarily involved in said suit are,

(a) Whether the contract on which said suit is based is legal and enforceable by the shipper or the plaintiff as his assignee in view of the fact that it appears on the face of this contract that if the claim made in the petition as to the value of the hog in question is true, the shipper, by means of its undervaluation, violated the penal provisions of the Act to Regulate Commerce as amended.

(b) Whether, under the Act to Regulate Commerce, as amended, the plaintiff may assert a claim for damages in an amount in excess of the value declared by the shipper to be the true value, and, upon this declaration, made the basis of the rate for the interstate transportation in question.

(c) Whether, under the Act to Regulate Commerce as amended, the provisions of the contract in suit limiting the liability of the defendant to the sum declared by the shipper in said contract to be the actual value of the animal in question is valid and enforceable.

(d) Whether under the Act to Regulate Commerce, as amended, the plaintiff, as assignor of the shipper, is estopped to set up in this suit that the hog in question was a greater value than the value declared to be its true value in the contract sued upon.

(e) Whether undervaluation of the hog in question by the shipper in order to obtain a rate for its interstate transportation lower than the published established rate constituted a violation by the shipper of the penal provisions of the Act to Regulate Commerce, as amended.

(f) Whether, if said penal provisions were so violated, the plaintiff's suit is founded upon what in law is his own wrong so as to preclude a recovery by him.

(g) Other questions arising under said Act to Regulate Commerce, as amended.

And your petitioner offers herewith a bond with good and sufficient surety for its entering in said Circuit Court of the United States on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein except to make an order for the removal of this cause to said circuit court and to accept the said surety and bond, and to cause the record herein to be removed unto said circuit court of the United States in and for the southern district of Iowa, central division, and he will ever pray.

Signed. N. T. GUERNSEY,
Attorney for Petitioner.

State of Iowa,)
)SS.
Polk County.)

I, N. T. Guernsey, being duly sworn, on oath state that I am the attorney for the petitioner in the above entitled cause; that I have read the foregoing petition and know the contents thereof; and that the statement and allegations therein contained are true, as I verily believe.

N. T. GUERNSEY.

Sworn to before me and subscribed in my presence by the said N. T. Guernsey on this 11th. day of September, 1908.
SEAL. CHAS HUTCHINSON.
Notary Public in and for Polk County, Iowa."

IV.

(OBJECTIONS TO REMOVAL FILED IN THE STATE COURT.)

That thereupon, your petitioner, Frank D. Winn, as plaintiff in said cause, filed in said District Court of Iowa in and for Polk County, his objections to the removal of the said cause to the said Circuit Court of the United States, which objections, so filed, are as follows:

In the District Court of the State of Iowa in and for Polk County. September Term. A. D., 1908.

"Frank D. Winn, *Plaintiff.*	)	
vs.	)	In Law. No. 17325.
The American Express Company,	)	Resistance to petition
Defendant.	)	for Removal.

Comes now the plaintiff, Frank D. Winn, and answering and resisting the petition for the defendant, for removal of the above entitled cause to the United States Circuit Court for the Southern District of Iowa, Central Division, respectfully sheweth unto the Court as follows:—

The original plaintiff herein denies that this case involves a controversy or dispute, properly within the jurisdiction of the said United States Circuit Court, and as reason for the said denial, respectfully alleges, denies, and states as follows:—

Plaintiff denies that this cause is properly removable to the said court on the ground of diverse citizenship, for the reason that the record herein plainly shows that it is a controversy between a citizen of the State of Missouri, plaintiff, and a citizen of the State of New York, the defendant,

and the said cause is not within the original jurisdiction of the said United States Circuit Court, and the said Circuit Court cannot acquire jurisdiction by removal, this plaintiff resisting.

The plaintiff further denies that this cause is one which arises under the laws of the United States, nor can it be said from an examination of the original petition filed herein, that there is a single allegation therein which involves a Federal Question. This cause is an action based upon the negligence of a common carrier, for damages.

This plaintiff denies that this cause as set up in the said suit is based upon, grows out of, or necessarily involves the construction of any statutes, laws, treaties, acts or other provisions of the Congress of the United States.

The said plaintiff, saving and reserving any and all objections which he has to the manifold imperfections in the manner of presenting the petition for removal to this court, and to all and singular the immaterial and irrelevant allegations therein contained, and answering severally the allegations of Federal questions stated to be involved in this cause, states as follows:—

(a) Plaintiff denies that the violation of any penal statute, State or Federal can or does enter into the merits of this cause, either by way of demand, defense or criminal prosecution; and plaintiff further denies that this action is based upon a contract of any nature whatever, as alleged in petition for removal, but alleges that the same is based, wholly and solely, upon tort.

(b) The plaintiff denies that the question of interstate commerce rates is involved in this case, and further denies that the interstate commerce act limited or attempted to limit, mentioned or included in it a single word relative to a limitation upon the amount of damages to be recovered in any case whatsoever.

(c) Plaintiff denies that the question of the validity or invalidity, enforceability or unenforceability of the limited liability contract has anythng whatever to do with the Federal Laws and Statutes, or presents a Federal question of any nature, but, contra, alleges that the validity or invalidity, enforceability or unenforceability of the said contract is cognizable by the courts of this state, or the particular state in which the said contract was made.

(d) Plaintiff denies that the Interstate Commerce Act made any provision for or reference to the assertion of values of live stock, or to the estoppel of shippers or their assignees from setting up any claim as to value, and further denies that this action is brought upon a contract as alleged in petition for removal.

(e) Plaintiff denies that any violation of any Criminal Code or law of the United States, or any other country, or any state, is involved in this case and further denies that the said act provides for, enacts or declares the undervaluation of property shipped by the shipper a crime, whether the undervaluation be made to secure a lower rate or for any other purpose.

(f) Plaintiff denies that the doctrine of "Preclusion of Recovery" involves particularly a Federal question and that that doctrine is cognizable only by Federal Courts. Plaintiff further denies that this suit is based upon any wrong of the shipper, but, contra, alleges that it is based upon the wrong of the defendant, The American Express Company, as the reading of the original petition herein filed will disclose.

(g) Plaintiff denies that there are any questions arising herein under the Act to Regulate Commerce, as amended, and denies that a single matter herein involves in any way the Act to Regulate Commerce, or any other United States Law.

Again referring to the petition of removal as filed herein, and to the imperfections therein, plaintiff denies the right

of the defendant to set forth the said matters in his petition as alleged in paragraphs a, b, c, d, e, f, g, and others, or any other matter explanatory of the said cause, and further respectfully sheweth unto this Honorable Court that it is not the province of this Honorable Court to consider the said matters of explanation, since, if the said cause is a removable one, that said fact must be determined by the allegations in the plaintiff's petition original, as no statement in the petition for removal can supply the want of an allegation of a Federal Question by the plaintiff in his petition.

Wherefore, the plaintiff, Frank D. Winn, resisting the said petition for removal, doth pray this Honorable Court to refuse the said order asked in defendant's petition, and doth further pray an order, directed to the said defendant to plead in this court forthwith, and further render judgment against defendant for the costs hereof.

Signed. FRANKLIN & MILLER,
Attorneys for Plaintiff.

State of Iowa,

ss.

County of Polk.

I, Guy A. Miller, upon oath depose and say that I am a member of the firm of Franklin & Miller, which firm appears as attorneys for the plaintiff herein; that I have knowledge of the facts concerning the said cause, have read the foregoing resistance and know the contents thereof, and that the allegations and denials therein contained are true and correct as I verily believe.

GUY A. MILLER.

Subscribed and sworn to before me this 12th day of Sept., A. D. 1908.

O. S. FRANKLIN.

SEAL. Notary Public in and for Polk County."

V.

That thereafter, and on the 1st day of December, A. D., 1908, the said District Court of Iowa in and for Polk County, entered an order denying the order asked by defendant to remove the said cause, as follows:

"FRANK D. WINN,

vs. No. 17325.

THE AMERICAN EXPRESS COMPANY.

Petition for Removal to Circuit Court of the United States, for the Southern District of Iowa, Central Division.

Overruled—defendant excepts."

VI.

(MOTION TO REMAND.)

Your petitioner further shows that within the time required by law, the said defendant did make a copy of the record in the said cause in the said District Court of Iowa. in and for Polk County, and did on the 31st day of October, A. D., 1908, file the same in the Circuit Court of the United States, for the Southern District of Iowa, Central Division, where the same was duly docketed and numbered 3804 Law; that on the16th day of November, A. D., 1908, and within the time required by law, and before any other and further proceedings were had in the said cause in the Circuit Court of the United States for the Southern District of Iowa, Central Division, the plaintiff filed in said court his motion to remand said cause, which motion is as follows:—

"FRANK D. WINN,

vs. Law, No. 3804.

THE AMERICAN EXPRESS COMPANY.

In the United States Circuit Court for the Southern District of Iowa, Central Division.

Comes now the plaintiff, by his attorneys, Franklin & Miller, and appearing specially for the purpose of this motion only, saving and reserving any and all objections which he has to the manifold imperfections in the mode, manner and method of the removal papers, and to all and singular the immaterial and irrelevant allegations therein contained, and expressly denying that this court has jurisdiction of this cause, or of the plaintiff therein, respectfully moves the court to remand this cause to the District Court of Iowa, in and for Polk County, from whence it was removed, for the reason that this suit does not involve a controversy or dispute properly within the jurisdiction of this court, and that it appears upon the face of the record herein that the plaintiff is a citizen and resident of the State of Missouri, and the defendant a resident of the State of New York, and the cause is not one within the original jurisdiction of this court; hence this court cannot acquire jurisdiction by removal.

Plaintiff denies each and every allegation in the petition for removal contained relative to the Federal Questions involved, and also to the allegatons that this cause arises under the Constitution, treaties, or laws of the United States, and further denies the right of the defendant to incorporate in its petition for removal the lengthy, irrelevant, and immaterial explanatory matter relative to the said allegations.

Wherefore your petitioner respectfully prays the court to order the said cause remanded to the District Court of Iowa in and for Polk County from whence it was removed, for

trial, and to assess the costs hereof to the defendant and their bondsmen.

FRANKLIN & MILLER,
Attorneys for Plaintiff."

VII.

(HEARING AND DENIAL OF MOTION TO REMAND.)

That the defendant filed no resistance to the said motion, and that subsequently and before any further and other proceedings were had in said cause, the said motion to remand came on to be heard, and the same having been submitted on the record and briefs of Plaintiff, your petitioner, and of the defendant, The American Express Company, was overruled and denied by the said Circuit Court of the United States for the Southern District of Iowa, Central Division, Hon. Smith McPherson, District Judge, sitting as Judge of said Court. And the said Hon. Smith McPherson, Judge as aforesaid, entered his order, judgment and decree therein, overruling and denying the said motion to remand, which is incorporated in "Exhibit A", hereto attached and made a part hereof, to which ruling plaintiff then and there excepted.

VIII.

(MANDAMUS ONLY ADEQUATE REMEDY).

Your petitioner further shows that by the ordinary remedy of appeal from final judgment of the Circuit Court of the United States in said suit at law, it may and probably will be several years before the question whether the said court should have retained jurisdiction of the said cause,

can be considered and determined by this Honorable Court; that your petitioner will be put to great expense, trouble and delay, in prosecuting said suit in said Circuit Court, Circuit Court of Appeals, and in the United States Supreme Court, all of which your petitioner believes to be unnecessary by reason of the lack of jurisdiction of said Circuit Court; that by reason of all these said facts and circumstances your petitioner has no remedy unless this Honorable Court interferes by writ of mandamus.

IX.

Petitioner further shows that he has furnished copies of this petition for mandamus and brief prepared by him, to N. T. Guernsey, attorney of record for the American Express Company, and to Judge Smith McPherson, Distict Judge for the Southern District of Iowa, Central Division.

X.

PRAYER.

Wherefore your petitioner prays that a rule be made and issue from this Honorable Court, directed to the said Honorable Smith McPherson, District Judge of the Southern District of Iowa, Central Division, and directing the said Circuit Court of the United States for the Southern District of Iowa, Central Division, to show cause why a writ of mandamus should not issue, commanding the said Judge and the said Court, and each of them to remand said suit at law to the District Court of Iowa in and for Polk County, and to desist from exercising any further jurisdiction in said suit, except to enter an order remanding said suit, and for such

other and further relief in the premises as shall seem just and meet, and your petitioner will ever pray.

W. H. Brunner
Guy A. Miller
Counsel for Petitioner.

State of Iowa,
SS.
County of Polk.

I, Guy A. Miller, being duly sworn, depose and say that I am a member of the firm of Franklin & Miller, who appear as attorneys for the above named petitioner, Frank D. Winn: that I have personal knowledge of all the proceedings which have been had in the several courts mentioned in said petition, and of the facts therein referred to; that I have read the foregoing petition, and that the statements made in the foregoing petition are true, and the copies of original documents mentioned therein are true and correct copies of such originals, and that the excepts therefrom and narratives thereof are true and correct, and are as affiant verily believes full and complete as to all material matters.

Guy A. Miller

Subscribed and sworn to before me this 12th day of February 1909.

O. J. Franklin

SEAL. Notary Public in and for Polk Co.

"EXHIBIT A".

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

FRANK D. WINN,
vs.
THE AMERICAN EXPRESS COMPANY.
NO. 3804 Law.

On the 24th day of November, 1908, at the November Term of this court, begun and holden in Des Moines, in and for the Southern District of Iowa, Central Division, and before the undersigned District Judge there came on to be heard the plaintiff's motion to remand this cause to the District Court of Iowa in and for Polk County, from whence it had been removed by the defendant; and thereupon the plaintiff presented his motion to have the said cause remanded, which motion is as follows:

"FRANK D. WINN.
vs. Law, No. 3804.
THE AMERICAN EXPRESS COMPANY.

In the Circuit Court of the United States for the Southern District of Iowa Central Division.

Comes now the plaintiff, by his attorneys, Franklin & Miller, and appearing specially for the purpose of this motion only, saving and reserving any and all objections which he has to the manifold imperfections in the mode, manner and method of the removal papers, and to all and singular the immaterial and irrelevant allegations therein contained, and expressly denying that this court has jurisdiction of this cause, or of the plaintiff therein, respectfully moves the court to remand this cause to the District Court of Iowa in and for Polk County, from whence it was removed, for the reason that this suit does not involve a controversy or dispute properly within the jurisdiction of this court, and that it

appears upon the face of the record herein that the plaintiff is a citizen and resident of the State of Missouri, and the defendant a resident of the State of New York, and the cause is not one within the original jurisdiction of this court; hence this court cannot acquire jurisdiction by removal.

Plaintiff denies each and every allegation in the petition for removal contained relative to the Federal questions involved, and also to the allegations that this cause arises under the Constitution, treaties, or laws of the United States, and further denies the right of the defendant to incorporate in his petition for removal the lengthy, irrelevant, and immaterial explanatory matter relative to the said allegations.

Wherefore your petitioner respectfully prays the court to order the said cause remanded to the District Court of the State of Iowa in and for Polk County, from whence it was removed, for trial, and to assess the costs hereof to the defendant and their bondsman.

FRANKLIN & MILLER,
Attorneys for Plaintiff."

And thereupon the said parties submitted the same, on said motion, and no testimony was offered by either party, and after the argument of counsel, and thereafter at a subsequent day of said term of court, to wit: On the 3rd day of December, 1908, the said motion to remand was overruled and denied as appears from judgment of the court, and plaintiff excepted to said order of court overruling said motion, which exception of plaintiff was then and there allowed, and same appears of record in this case.

JUDGMENT OVERRULING AND DENYING MOTION TO REMAND.

"FRANK D. WINN,

vs. Law, 3804.

THE AMERICAN EXPRESS COMPANY.

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

This cause came on this day for hearing on plaintiff's motion to remand this cause to the District Court of Iowa and the Court being sufficiently advised overrules said motion to which the plaintiff excepts.

Dated this 3rd day of December, A. D., 1908.

Signed. SMITH MCPHERSON,

District Judge."

In the
Supreme Court of the United States

IN THE MATTER OF

The application of Frank D. Winn, for a writ of mandamus against the Hon. Smith McPherson, District Judge of the United States, for the Southern District of Iowa, Central Division, and against the Circuit Court of the United States, for the Southern District of Iowa, Central Division.

To the Honorable Melville W. Fuller, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

BRIEF FOR PETITIONER

Mandamus does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrian inferior courts, and to keep them within their lawful bounds.

(Virginia v. Rives (Ex Parte Virginia) 100 U. S. 316.)

Where a circuit court has no jurisdiction over a cause removed by defendant from a state court, and refuses to remand it upon proper motion, mandamus is plaintiff's remedy.

(*Ex parte Wisner*, 203 U. S. 449.)

The difference between the case at bar, and the case of *Ex parte*—In the matter of the State of Nebraska, 209 U.

S. 436, and *Re James Pollitz*, 206 U. S. 323, is, that in the latter cases the court was called upon to decide, in a judicial capacity and to use his discretion therein, a question outside the jurisdictional one, to wit, whether or not there was a separable controversy between citizens wholly of different states to the determination of which the state was or was not a necessary party. Had the matter to have been decided therein been upon the question of diverse citizenship, or whether or not the plaintiff's original petition presented a federal question, then there had not been such a discretion as to have defeated the issuance of the writ. In other words, the discretionary powers necessary to defeat the issuance of the writ of mandamus, must be such discretionary powers exercised in connection with matters outside the record.

(*Ex parte*:—In the matter of the State of Nebraska, 209 U. S. 436.)
(*Re James Pollitz*, 206 U. S. 323.)

Want of jurisdiction from any cause appearing on the face of the record, entitles plaintiff to a writ of mandamus where the Federal Court refuses to perform the duty to remand, as these cases are outside the discretion and jurisdiction of the court.

(*Virginia v. Paul*, 148 U. S. 107.)
(*Virginia v. Rives, supra.*)
(*Ex parte Wisner, supra.*)

Under Sections 1, 2, 3, of the Act of March 3, 1875 (18 Stat. at L. Chap. 137), as amended by the Act of March 3, 1887 (24 Stat. at L. 552, Chap. 373) corrected by the Act of August 13, 1888 (25 Stat. at L. 433, Chap. 866, U. S. Comp. Stat. 1901, p. 508) an action commenced in the state court, by a citizen of another state, against a non-resident defendant, who is a citizen of a state other than that of plain

tiff, cannot be removed by the defendant into the Circuit Court of the United States, on the ground of diverse citizenship, at least where the plaintiff resists the removal

(Ex parte Abraham C. Wisner, supra.)

A case cannot be removed to the Circuit Court of the United States from a State Court, on the ground that it arises under the Laws of the United States, unless that fact appears from the plaintiff's statement of his own claim; and if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in any subsequent pleadings. This contention is so elementary that it needs no extensive citation of authority to sustain it.

(*Metcalf v. Watertown*, 128 U. S. 586.)

(*State of Minnesota v. Northern Securities Co.*, 194 U. S. 453.)

(*State of Tennessee v. Union & Planters' Bank*, 152 U. S. 453.)

The suggestion on the part of the defendant that he will set up a defense or claim under the laws of the United States does not make the suit one arising under those laws.

(*State of Tenn. v. Union & Planters' Bank, supra.*)

(*Boston & M. Con. Copper S. Min. Co. v. Montana Ore Pur. Co.*, 188 U. S. 632.)

The defendant has lost the distinction between a case that arises under the laws of the United States, and a case that the plaintiff has no right to maintain by reason of some federal law. Were the plaintiff to admit all the allegations in petition for removal, relative to the Act to Regulate Commerce, it would only show that the plaintiff was unable to recover, and not that this case arises under any law of the United States.

(*State of Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185.)

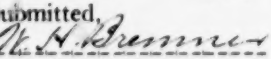
The settled interpretation of the words "arising under the laws of the United States", is that a suit arises under such laws only when the plaintiff's statement of his own claim shows that it is based upon those laws. It is not enough that in the progress of litigation a question under those laws would arise, since that does not show that plaintiff's action derived its life from those laws.

(*Louisville & Nashville Railroad Co. v. Mottley, et al.*, Decided November 16, 1908.)

The question whether or not a shipper is entitled to recover more than the declared value of stock in a contract for inter-state shipment does not present a Federal Question.

(*Pennsylvania R. Co. v. Hughes*, 191 U. S. 477.)

Respectfully Submitted,



GUY A. MILLER,

O. S. FRANKLIN,

Attorneys and Counsel for Plaintiff.

Office Supreme Court, U. S.
FILED.
APR 2 1909
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

NO. 12 ORIGINAL, OCTOBER TERM, 1908.

EX PARTE, IN THE MATTER OF FRANK D. WINN, PETITIONER.

The answer of Smith McPherson, Judge of the District Court of the United States for the southern district of Iowa, central division, holding the Circuit Court of the United States for the southern district of Iowa, central division in his own behalf and in behalf of the said Circuit Court to the rule to show cause in the above entitled matter.

IN THE

SUPREME COURT OF THE UNITED STATES.

NO. 12 ORIGINAL. OCTOBER TERM 1908.

EX PARTE. IN THE MATTER OF FRANK D. WINN, PETITIONER.

The answer of Smith McPherson, Judge of the District Court of the United States for the southern district of Iowa, central division, holding the Circuit Court of the United States for the southern district of Iowa, central division, in his own behalf and in behalf of the said Circuit Court, to the rule to show cause in the above entitled matter:

To the Honorable Melville W. Fuller, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The respondent respectfully answers and certifies:

(1) That, as stated in the petition filed in this matter, the petitioner, Frank D. Winn, instituted an action at law in the district court of the state of Iowa for Polk county, against the American Express Company as defendant and filed therein his petition; and that the copy of said petition which is set out in paragraph second of the petition for a writ of mandamus in this matter, is substantially correct, with the following exceptions:

In line 3, page 10, the words "which result from their propensities or natures" are interpolated, and they should be stricken out:

In line 6, page 10, before the word "which" the words "or

which result from their propensities or natures" are omitted, and should be there inserted.

In line 10, page 10, before "employes" insert "or."

In line 12, page 10, after "liable" insert "only."

In line 22, page 10, the word "may" after "option" should be placed after "company."

In line 13, page 11, the word "for" should be "from."

In line 31, page 11, the word "therefor" should be "thereof."

(2) That, as shown by the third paragraph of the petition filed in this matter, a petition for removal was filed within the time required by law in the district court of the state of Iowa in and for Polk county, by the American Express Company, the defendant in the said suit of *Frank D. Winn vs. American Express Company,* and that the copy of the said petition for removal set out in the third paragraph of the petition filed by said Winn in this matter is substantially correct, except minor typographical errors.

That the said petition for removal was so filed in said district court of the state of Iowa, at a time before the said American Express Company, the defendant in said suit, was required by the laws of the state of Iowa, or by the rules of said district court of the state of Iowa to answer or plead to the said petition filed in said court by said Winn; and that the said American Express Company made and filed therewith a bond with good and sufficient surety in all respects in due form, and conditioned as required by the statute in such cases made and provided.

(3) That objections to the removal of the said suit were filed, as stated in paragraph four of the petition herein, and that the said paragraph contains a substantially correct copy of the said objections.

(4) That the district court of the state of Iowa in and for Polk county made the order set out in paragraph five of the petition filed herein.

(5) That the defendant in said case of *Frank D. Winn vs. American Express Company,* caused a certified copy of the record in said cause in the said district court of Iowa in and for Polk county to be entered and filed on the 31st day of October, 1908, in the Circuit Court of the United States for the southern district of Iowa, central division, in due time and in all respects in conformity with law and the said cause was duly docketed in said circuit court and was numbered 3804 law, therein.

(6) That a motion to remand was filed in said cause by the plaintiff therein, as stated in paragraph six of the petition of said Winn in this matter, and that what purports to be a copy of the said motion set out in said paragraph, is a substantially correct copy thereof.

(7) That thereafter, and in the ordinary course, the said motion came on to be heard before the said Circuit Court of the United States for the southern district of Iowa, which was then being held by the respondent sitting as judge of the said court, and upon said hearing counsel for the said Winn was heard orally in support of the said motion and counsel for the said American Express Company was heard orally in resistance thereof and briefs were filed by said counsel in behalf of the respective parties. That it thereupon became and was the duty of the respondent as the judge holding the said Circuit Court, to hear the arguments of counsel for the parties upon the said motion to remand, and to consider and decide the said motion; and that pursuant to said duty the respondent, as judge holding the said Circuit Court, did hear the said arguments and did consider and decide the questions presented by the said motion to remand. The respondent further shows that the said motion to remand was denied by him, as the judge holding the said Circuit Court, in the exercise of the jurisdiction conferred upon him by law, and that his decision upon said motion was in the

exercise of judicial judgment and discretion vested in him by law, and that pursuant to and in accordance with the said decision and determination of the said motion, the order overruling the said motion to remand, which is set out on page 29 of the petition filed in this matter, was entered by the respondent, as the judge holding the said Circuit Court.

The said order as shown by the record, was signed "Smith McPherson, Judge," and was not signed "Smith McPherson, District Judge," as shown at said page 29. That the record shown at said page 29 is the entire record made and entered in said suit in said Circuit Court upon said motion to remand, and that what is set out on pages 27 and 28 of the petition filed by said Winn in this matter, (except only the copy of the motion to remand incorporated therein) is not any part of it a part of any record, or a copy of any record entered or filed in said Circuit Court in said suit of *Frank D. Winn vs. American Express Company.*

(8) That on the 16th day of November, A. D. 1908, Franklin & Miller, the attorneys for the plaintiff in the said suit of *Frank D. Winn vs. American Express Company*, filed in the said suit, in the office of the clerk of the said Circuit Court, their praecipe for appearance, as follows:

In United States Circuit Court, Southern District of Iowa, Central Division.

Frank D. Winn, *Plaintiff,*	No. 3804 Law.
vs. *The American Express Company,* *Defendant.*	PRAECIPE FOR APPEARANCE.

The Clerk of the said Court will please enter our appearance for Frank D. Winn, Plaintiff in above Cause, and Docket the same on the ——— Docket.

FRANKLIN & MILLER.

(9) That thereafter, and on the 4th day of December, A. D.

1908, the parties to said cause filed in the said cause in the office of the clerk of the said Circuit Court, a stipulation, duly signed by the attorneys of record for the respective parties, of which the following is a copy:

In the United States Circuit Court in and for the Southern District of Iowa, Central Division.

Frank D. Winn,
Plaintiff,
vs.
American Express Company,
Defendant.
} STIPULATION.

In the above entitled cause it is stipulated by the parties thereto

1. That the plaintiff shall file a cost bond within fifteen days in the sum of five hundred dollars.

2. That the defendant shall have thirty days after the filing of such cost bond within which to prepare and file its answer to the plaintiff's petition.

Dated Dec. 4, 1908.

FRANKLIN & MILLER,
Attorneys for Plaintiff.
N. T. GUERNSEY,
Attorney for Defendant.

(10) That on the 11th day of December, A. D. 1908, the plaintiff in the said cause filed therein a cost bond in the words and figures following, to-wit:

UNITED STATES OF AMERICA,
DISTRICT OF IOWA,
} ss:

Circuit Court, November Term, A. D. 1908.

Frank D. Winn,
vs.
The American Express Company.
} No. 3804—Law.

We enter our security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this Court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him hereby agree and stipulate that

execution may issue against our property for any costs taxed against him.

Dated this 11th day of December, A. D. 1908.

UNITED SURETY COMPANY,
By Jessie Lee Willeay,
Atty.-in-Fact.

(11) That thereafter, and on or about the 11th day of January, 1909, the defendant filed in the said cause its answer, a copy of which is as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

Frank D. Winn,
Plaintiff,
vs.
American Express Company,
Defendant.
} ANSWER.

The defendant for answer to plaintiff's petition respectfully shows to the court as follows, to-wit:

This defendant admits the making of the contract, Exhibit "A" to the plaintiff's petition, and that upon the date of the said contract the hog in question was delivered to the defendant at the state fair grounds in Des Moines, Iowa, for transportation in accordance with the said contract.

This defendant further admits that the hog in question was loaded with other hogs upon a transfer wagon, but denies that it was loaded thereon in the manner stated by the plaintiff.

This defendant admits that the night in question was a very hot one, and that after he was loaded the hog began to suffer with the heat.

This defendant admits that the wagon containing the hog in question was driven by the driver thereof to the office of the defendant, and alleges that this was for the purpose of loading the said animal upon the cars in order to transport it in accordance with the contract referred to.

This defendant further admits that the animal in question died shortly after it reached the railroad station where it was to be loaded on the car.

This defendant denies each and every allegation in the plaintiff's petition not hereinbefore admitted.

Further answering, this defendant respectfully shows to the court that the death of the hog in question was due to excessive heat and to the physical condition and natural propensities of the said animal, and was not due to any negligence or lack of care on the part of this defendant.

This defendant further respectfully shows to the court as follows, to-wit:

That it is provided in the contract, Exhibit "A" to the plaintiff's petition, among other things, as follows:

> The shipper agrees to load, tranship, and unload said animals at his own risk, and during the transportation thereof, to unload and load the said animals whenever the same may be necessary or required, at his own risk, and to furnish the necessary laborers therefor; and further agrees to cause the necessary attendants to accompany and take charge of said animals, the Express Company furnishing free transportation for the attendants who have signed the Attendant's Contract appended hereto, and also furnishing laborers to assist in loading and unloading said animals at the point of shipment and destination, such attendants and laborers not to be regarded, deemed or taken to be the Agents of the Express Company for any purpose whatever, but, on the contrary, such attendants and laborers shall be deemed and taken to be the agents of the shipper.

That one of the owners of the animal in question was present when the said animal was loaded upon the transfer wagon referred to and accompanied the said animal upon the said wagon to the railroad station, and was with it continually from the time it was loaded until its death; and that whatever was done in connection with the transportation of the said animal was done with the concurrence and approval of the owner thereof and without protest or objection from him; and that all precautions suggested by him for its welfare were adopted and followed out.

This defendant further respectfully shows to the court that the tariff of rates applicable to the transportation covered by the contract attached to the plaintiff's petition made no provision for special services whereby the animal in question could be hauled to the cars in a single covered

wagon by itself; and that in the absence of such a provision in said tariff, no agreement could legally be made for said service.

This defendant further respectfully shows to the court that the tariff of rates under which the shipment in question was made, provided a schedule of alternative rates based upon the value of the animal shipped. That the plaintiff's assignors, in order to secure the transportation in question at less than the published tariff rates, wrongfully misrepresented the value of the animal in question and stated the same to be fifty dollars ($50.00), when, as a matter of fact, the value of the said animal at the time, if it was then in good health, was much in excess of the sum of fifty dollars ($50.00), which fact was known to the plaintiff's assignors at the time that the said valuation was given, but was not known to the defendant, whih, at the time, had no knowledge as to the value of the animal in question, except that obtained from the shippers thereof.

That by reason of the premises, the shipment in question was unlawful. That the plaintiff is not entitled to recover, and is estopped from asserting that the value of the animal in question was, at the time of the said shipment, more than the sum of fifty dollars ($50.00).

This defendant further respectfully shows to the court that by the terms of the contract sued on, the recovery of the plaintiff, if he is entitled to recover, is expressly limited to the sum of fifty dollars ($50.00) and denies that the plaintiff could, in any event, recover more than the said amount.

WHEREFORE this defendant prays to be dismissed with its costs.

N. T. GUERNSEY,
Attorney for Defendant.

(12) This respondent respectfully submits that the said order overruling the said motion to remand was in full and complete conformity to law because:

(a) Upon the face of the petition filed in the state court it appeared that the said suit of *Frank D. Winn vs. American Express Company* is a suit of a civil nature, at law, where the matter in dispute exceeds, exclusive of interest and costs, the

sum or value of two thousand dollars ($2,000.00), and arising under the laws of the United States;

(b) That as shown by the petition of said Winn for a writ of mandamus it clearly appears from the averments of various pleadings filed by said Winn in said suit of *Frank D. Winn vs. American Express Company* that the said suit is a controversy between citizens of different states involving more than the jurisdictional amount, in which each party has waived such objections, if any, as he might have otherwise urged against the bringing of said suit in the southern district of Iowa.

(c) That it appears upon the face of the petition filed by said Winn in said suit of *Frank D. Winn vs. American Express Company* that said suit involves controversies arising under the laws of the United States.

(d) That the proper remedy to be invoked by said Winn to question the correctness of the ruling on said motion to remand is an appeal, and not mandamus.

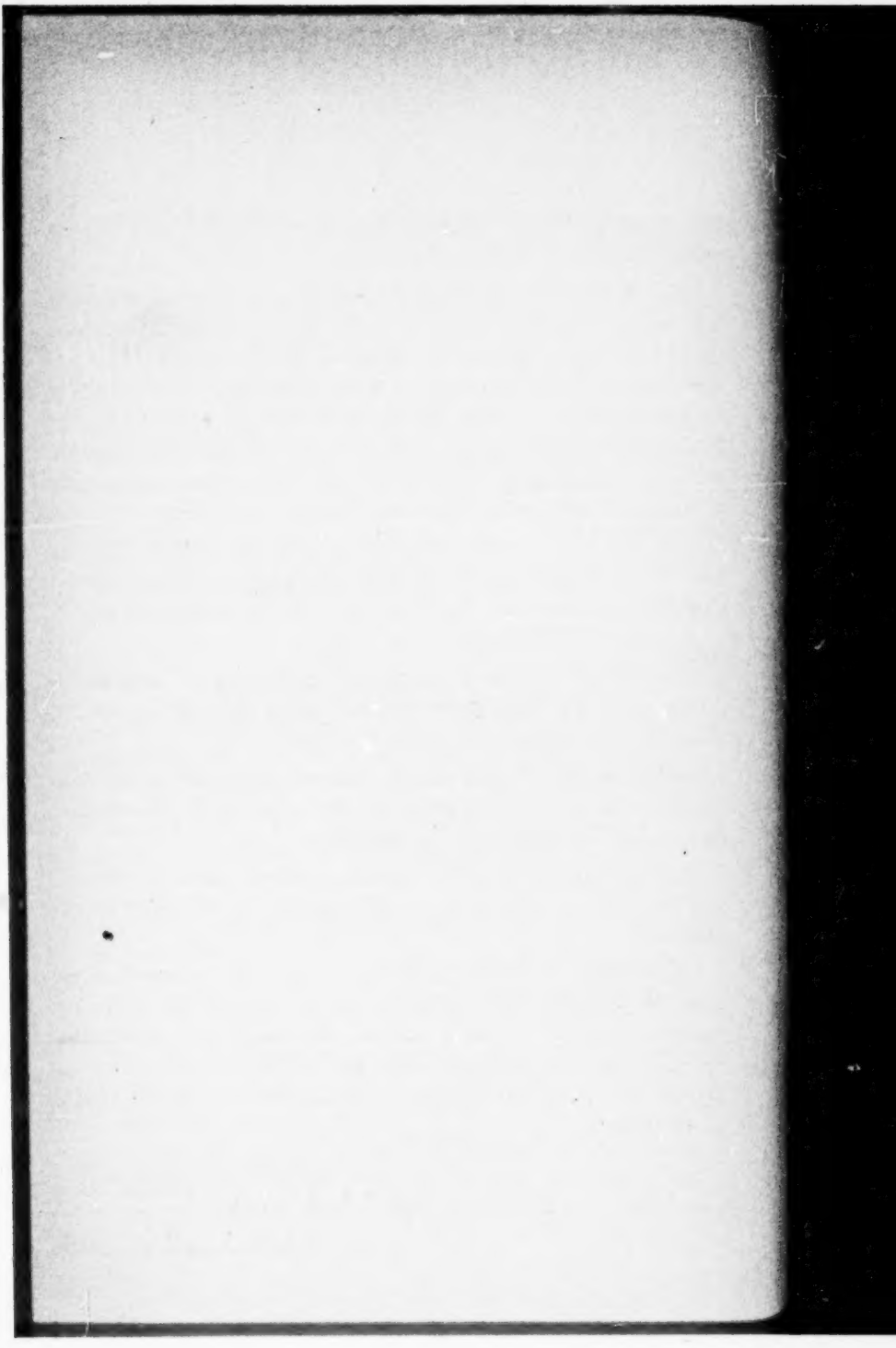
And these are the causes and reasons which this respondent shows why a writ of mandamus should not issue and the prayer of said petition should not be granted.

But he respectfully submits to the judgment of the court, and will enforce by order any direction given by the court in the premises.

IN WITNESS WHEREOF I have hereunto subscribed my name as judge of the district court of the United States for the southern district of Iowa, and, as the judge duly designated therefor and holding said court, for the Circuit Court of the United States for said district, on this thirty-first day of March, A. D. 1909.

SMITH McPHERSON.

United States District Ju
and Circuit Circuit Ju



IN THE

UNITED STATES SUPREME COURT

NO. 12 ORIGINAL. OCTOBER TERM 1908.

EX PARTE, IN THE MATTER OF
FRANK D. WINN,
Petitioner.

BRIEF IN BEHALF OF RESPONDENT.

STATEMENT.

The petitioner, Frank D. Winn, on the 28th day of May, 1908, commenced an action at law against the American Express company in the district court of the state of Iowa, in and for Polk county, claiming $8,000.00 damages, on account of the death of a hog which he had shipped by the defendant company from the state fair grounds at Des Moines, Iowa, to Lincoln, Nebraska. In due time the defendant filed a petition for the removal of this case to the circuit court of the United States for the southern district of Iowa, predicated upon the claim that the case involves a federal question (petition page 14, return page 2). The plaintiff resisted the petition for removal (petition page 18) and it was overruled by the state court (petition page 22). Thereupon the defendant entered a copy of the record in the circuit court (petition page 22, return page 3), and the plaintiff filed a motion to remand (petition page 23). This motion was overruled (petition page 29) and it is to reverse this ruling that this petition for a writ of mandamus is filed.

POINTS.

I.

The jurisdiction of the circuit court is beyond question.

It affirmatively appears from the pleadings filed by the petitioner, Winn, that the parties are citizens of different states and that the amount in controversy exceeds the sum or value of $2,000.00. The contention that the case is ruled by

Ex parte Wisner, 203 U. S. 449,

is unsound, because both parties waived any objection which might have been urged to the maintenance of the suit in the southern district of Iowa. The defendant did this by its petition for removal and otherwise. The plaintiff did it by a general appearance, by a stipulation for a cost bond and for time to plead, and by filing a cost bond in conformity to this stipulation.

Interior Construction Company vs. Gibney, 160 U. S. 217-220.

In re Moore, 209 U. S. 490.

II.

Upon the face of the plaintiff's petition, the case presented questions arising under the laws of the United States.

The character of a case is determined by the questions involved, and if it appears that the claim will be defeated by one construction of a law of the United States or sustained by the opposite construction, it is a case arising under the laws of the United States.

Starin vs. New York, 115 U. S. 248-257.

Tennessee vs. Union & Planters Bank, 152 U. S. 454.

Bankers Casualty Co. vs. Minn., St. P., etc., Ry. Co.,

192 U. S. 371-380.

This doctrine does not conflict with the line of cases holding that a federal question may not be imported into a case by the averments of the answer. Upon the face of the petition filed in the state court, the case necessarily involved the determination of the following questions under the Act to Regulate Commerce:

(a) *Whether the contract limiting the liability of the defendant to $50.00 is valid under the provisions of section 20 of the Act to Regulate Commerce as amended by section 7 of the Hepburn Act.*

This is a question already considered by the Interstate Commerce Commission,

In the matter of Released Rates, 13 Interstate Commerce Commission Reports 550,

but it has not been authoritatively determined by the courts.

Pennsylvania Railroad Co. vs. Hughes, 191 U. S. 477,

was decided prior to the Hepburn Act and is not in point.

(b) *Whether the special contract to haul the hog in a single covered wagon is valid.*

This is a special service. The validity of the contract for this service involves the question whether the Act to Regulate Commerce requires that it shall be covered by a tariff and whether there is in fact a tariff filed in conformity with the Act which does cover it.

Wight vs. United States, 167 U. S. 512.

(c) *Whether the misrepresentation, by the shipper, of the value of the hog, in order to secure a lower rate, was a violation of the Act to Regulate Commerce; and if so, its effect upon the plaintiff's claim.*

The rates in question varied with the value. This false undervaluation resulted in securing to the plaintiff a rate lower than the published rate. The question arises whether this was a violation of section 10 of the Act to Regulate Commerce; and if it was, whether the plaintiff could recover under those circumstances.

III.

Mandamus is not the proper remedy.

The determination of the motion to remand involved an exercise of judicial judgment and discretion, which must be reviewed, if at all, by appeal.

In re Pollitz, 206 U. S. 330.
Ex parte, State of Nebraska, 209 U. S. 436.

ARGUMENT.

I.

The jurisdiction of the circuit court is beyond question.

The petitioner, Winn, alleged in his petition, filed in the state court (petition page 4):

> That the defendant is a corporation organized under and existing by virtue of the laws of the state of New York, and doing business as a common carrier in the county of Polk, state of Iowa.

He also alleged in his resistance to the petition for removal (petition page 18):

> Plaintiff denies that this cause is properly removable to the said court on the ground of diverse citizenship, for the reason that the record herein plainly shows that it is a controversy between a citizen of the state of Missouri, plaintiff, and a citizen of the state of New York, the defendant, and the said cause is not within the original jurisdiction of the said United

> States Circuit Court, and the said circuit court cannot acquire jurisdiction by removal, this plaintiff resisting.

The amount of the plaintiff's claim is $8,000.00. In the motion to remand (petition page 23) the petitioner alleges:

> It appears upon the face of the record herein that the plaintiff is a citizen and resident of the state of Missouri, and the defendant a resident of the state of New York, and the cause is not one within the original jurisdiction of this court; hence this court cannot acquire jurisdiction by removal.

It therefore appears from the averments of the pleadings filed by the petitioner, that the suit is a suit of a civil nature between citizens of different states, where the amount in controversy exceeds exclusive of interest and costs the sum or value of $2,000.00. The jurisdiction of the circuit court is therefore unquestionable.

The contention of the petitioner is obviously that the case is ruled by

Ex parte Wisner, 203 U. S. 449,

but it conclusively appears, from the return to the rule to show cause, that the plaintiff has waived any right which he may have had to assert that this suit is not brought in the right district. In paragraph eight of the return, it appears that the attorneys for Winn entered a general appearance in the circuit court in the said case of *Winn vs. American Express Company* (return page 4), and in paragraph nine of the return, it appears that on December 4, 1908, the parties to the suit entered into a stipulation, by which the plaintiff, Winn, was given time within which to file a cost bond, and the defendant was given thirty days thereafter within which to answer (return page 5). Pursuant to this stipulation, the plaintiff filed his cost bond

on December 11, 1908, and the defendant filed its answer on January 11, 1909 (return, pages 5 and 6).

The petition for removal and stipulation and answer constituted a waiver, so far as the defendant is concerned, and the plaintiff's general appearance, and his stipulation and filing a bond pursuant to the stipulation, constituted a waiver on his part. In

Interior Construction Company vs. Gibney, 160 U. S. 217-220,

it is said:

> Defendants who have appeared generally in the action cannot even object that they were themselves inhabitants of another district, and, of course, cannot object that others of the defendants were such.

In re Moore, 209 U. S. 490,

decides that the objection that the case is not brought in or removed to the particular federal court provided by the statute, is a matter of personal privilege, which the parties may waive. In that case, "a stipulation giving time to the defendant to answer" (page 496) is recognized as such a waiver. This is exactly what was done in the instant case. The cost bond and the answer were filed pursuant to this stipulation. It is therefore clear that the jurisdiction may not be challenged upon the theory that this suit is not pending in the proper district.

II.

Upon the face of the plaintiff's petition, the case presented questions arising under the laws of the United States.

In

Starin vs. New York, 115 U. S. 248-257,

it is said:

> The character of a case is determined by the questions involved. *Osborn vs. Bank of United States*, 9

Wheat. 737, 824. If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not. Such is the effect of the decisions on this subject. *Cohens vs. Virginia*, 6 Wheat, 264, 379; *Osborn vs. Bank of the United States*, 9 Wheat. 737, 824; *The Mayor vs. Cooper*, 6 Wall. 247, 252; *Gold Washing & Water Co. vs. Keyes*, 96 U. S. 199, 201; *Tennessee vs. Davis*, 100 U. S. 257, 264; *Railroad Co. vs. Mississippi*, 102 U. S. 135, 140; *Ames vs. Kansas*, 111 U. S. 449, 462; *Kansas Pacific vs. Atchison Railroad*, 112 U. S. 414, 416; *Provident Savings Co. vs. Ford*, 114 U. S. 635, 641; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11.

This doctrine has been reaffirmed in many cases, two of which are

Tennessee vs. Union & Planters Bank, 152 U. S. 454.
Bankers Casualty Co. vs. Minn., St. P., etc., Ry. Co., 192 U. S. 371-380.

In

Tennessee vs. Union & Planters Bank, supra,

it is decided that the effect of the Act of March 3, 1887, as corrected by the Act of August 13, 1888, is to limit the jurisdiction, either originally or upon removal, to those cases where it appears by the plaintiff's statement of his claim that a federal question is involved. The cases cited by counsel for the petitioner do not overrule the cases to which we have referred. They simply follow *Tennessee vs. Union & Planters Bank*, in holding that the federal question must appear "by plaintiff's statement of his own claim." All that is decided by *Louisville & Nashville Railroad Company vs. Mottley*, decided November 16, 1908, by this court, is that a federal question may not be imported

into the case by averments in the answer; and this is the settled rule.

Upon the face of the petition filed by Winn in the state court, it affirmatively appears that the decision of that case necessarily involved a construction of the Interstate Commerce Act. The plaintiff's petition necessarily involved, and any court in entering a judgment upon it would necessarily be required to determine, among others, the following questions:

(a) *Whether the contract limiting the liability of the defendant to $50.00 is valid under the provisions of section 20 of the Act to Regulate Commerce, approved February 11, 1887, as amended by section 7 of the Hepburn Act, approved June 29,1906.*

As so amended, section 20 provides, among other things:

> That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contracts, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; Provided, *That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.*

That this is in fact a practical, and not a merely academic question, is shown by the report of the Interstate Commerce Commission in the case entitled

> *In the matter of Released Rates,* 13 Interstate Commerce Commission Reports 550.

This report commences with the following sentence:

Since the passage of the Hepburn Act the Commission has been in receipt of numerous requests for an administrative interpretation of that part of section 20 which deals with the liability of carriers.

After stating certain distinctions, it says:

Bearing these distinctions in mind, we must determine the validity of "Released Rates" of the following character:

I. Rates conditioned upon the shipper's assuming the risk of loss due to causes beyond the carrier's control.

II. Rates conditioned upon the shipper's assuming the entire risk of loss.

III. Rates conditioned upon the shipper's agreeing that the carrier's liability shall be limited to a certain specified value.

The Commission then states its conclusions at page 561, as follows:

I. If a rate is conditioned upon the shipper's assuming the risk of loss due to causes beyond the carrier's control, the condition is valid.

II. If a rate is conditioned upon the shipper's assuming the entire risk of loss, the condition is void as against loss due to the carrier's negligence or other misconduct.

III. If a rate is conditioned upon the shipper's agreeing that the carrier's liability shall not exceed a certain specified value—

a. The stipulation is valid, when loss occurs through causes beyond the carrier's control.

b. The stipulation is valid, even when loss is due to the carrier's negligence, if the shipper has simself declared the value, expressly or by implication, the carrier accepting the same in good faith as the real value, and the rate of freight being fixed in accordance therewith.

c. The stipulation is void as against loss due to the carrier's negligence or other misconduct if the specified amount does not purport to be an agreed valua-

tion, but has been fixed arbitrarily by the carrier without reference to the real value.

d. The stipulation is void as against loss due to the carrier's negligence or other misconduct if the specified amount, while purporting to be an agreed valuation, is in fact purely fictitious and represents an attempt to limit the carrier's liability to an arbitrary amount.

So far as we are advised, it has not been authoritatively determined by any court whether the construction which the Commission has placed upon the Act to Regulate Commerce in connection with contracts, such as the one set out by Winn as a part of his petition, is correct or not, and we submit that it is entirely obvious upon the face of this petition that this case necessarily involves these questions. If defendant had not answered this question would still be presented and would have to be determined before the court could say the plaintiff could in any event recover $8,000.

The case of

Pennsylvania Railroad Company vs. Hughes, 191 U. S. 477,

is not in point, because it was decided some three years prior to the enactment of the Hepburn Act. After an inspection of the Act to Regulate Commerce as it then stood this court said in that case, page 448:

> We look in vain for any regulation of the matter here in controversy.

(b) *Whether the special contract to haul the hog in a single covered wagon is valid.*

This is set out at the top of page 5 of the petition. A fundamental contention of the plaintiff in the case was that the defendant failed in its obligations, in that instead of hauling the animal in a single covered wagon as it had agreed to do it hauled him in a transfer wagon with a

number of other hogs, completely shutting off the circulation of air and thereby reducing the ability of the animal to resist the effects of the excessively high temperature.

There is immediately presented the question whether, under the Act to Regulate Commerce, such a contract is valid in the absence of the averment that there was any tariff on file authorizing such special service, and in the face of the averment that the shipment was made under the contract, Exhibit "A" to plaintiff's petition (petition, page 7), which contains no provision for such special service and provides for no compensation for this service. Whatever the answer alleges, the question whether there must be a tariff filed covering such special service inheres in this allegation of the petition. This court held in

Wight vs. United States, 167 U. S. 512,

that where the rate charged two shippers between Pittsburg and Cincinnati was the same, but free cartage was furnished to one who had no siding, this was an unlawful discrimination and a violation of provisions of the Act to Regulate Commerce. Before the effect of the alleged violation this agreement for special service can be determined there is the fundamental question whether the agreement was valid and lawful, which must be determined by the construction of the Act to Regulate Commerce.

(c) *Whether the misrepresentation by the shipper of the value of the hog in order to secure a lower rate was a violation of the Act to Regulate Commerce; and if so, its effect upon the plaintiff's claim.*

Section 10 of the Act as amended provides, among other things, as follows:

> Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the pro-

> visions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and wilfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, *or by any other device or means,* whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.

The contract for shipment is preceded by the following notice (Exhibit "A," page 7 petition):

> NOTICE TO SHIPPERS. The shipper will value his stock, which valuation will be inserted in the contract, and the charge for carriage and any liability for damage will be based on such valuation.

Upon page 8 it appears that the rates are "alternative rates, proportioned to the value of said animals." On page 9 is shown the basis for fixing the rate where the value exceeds the minimum. This contract (petition page 9) also provides as follows:

> The shipper, in order to avail himself of said alternative rates and in consideration thereof, being asked by the said Express Company to value the said property, now declares the value hereinafter mentioned to be the *true values* of said animals so to be shipped, as follows, to-wit: (Number and kind). One hog crated. Value each $50.00.

The legal rate under this contract varies with the value and this false undervaluation enabled the plaintiff to se-

cure the benefit of a rate which was less than the legal rate. It constituted a violation of the portion of the law which has just been quoted; or in any event there inheres in this case the question whether it did so violate that law. If it did the question at once arises whether under those circumstances the plaintiff could recover anything or, in any event, more than $50.00 named in the contract.

These questions all appear upon the face of the plaintiff's claim as stated by him. If no answer were filed, it would be impossible for the court to allow the plaintiff's claim for this $8,000.00 without deciding these questions under the Act to Regulate Commerce. By one construction of this act, the contract limiting the defendant's liability may be sustained; by another construction, it may be overthrown. By one construction of this act, the special contract to haul the animal in a single wagon may be upheld; by another, it must be disregarded. By one construction of the act, the plaintiff, in inducing this contract by his misrepresentation of the value of the animal, violated the act; by another, he did not. These questions are involved in this case and they determine its character.

III.

Mandamus is not the proper remedy.

In paragraph seven of the return, page 3, it appears that the motion to remand came on to be heard in the regular manner and was argued, both orally and upon briefs, by counsel for both parties, imposing upon the court the duty of considering and deciding this motion; and that the court considered and decided the questions presented by the motion. This involved an exercise of the judicial judgment and discretion vested in the court by law, and the remedy, if the petitioner desires to review this judgment,

is by writ of error and not by mandamus. The case comes squarely within the rule of

In re Pollitz, 206 U. S. 330.

Ex parte, State of Nebraska, 209 U. S. 436.

In the *Pollitz* case, the question was whether a separable controversy was involved so as to render the cause removable. Here, the issue on the motion to remand was whether there was a federal question involved so as to render the cause removable. In the *Pollitz* case, at page 331, the court says:

> The issue on the motion to remand was whether such determination could be had without the presence of defendants other than the Wabash Railroad Company, and this was judicially determined by the circuit court, to which the decision was by law committed.
>
> The application to this court is for the issue of the writ of mandamus directing the circuit court to reverse its decision, although in its nature a judicial act and within the scope of its jurisdiction and discretion.
>
> But mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error.

The only difference between that case and this is that here, the issue on the motion to remand was whether the case involved a federal question instead of whether it involved a separable controversy.

In

Ex parte Nebraska,

the court says at page 440:

> The motion to remand presented for decision the question whether there was in the case a controversy wholly between citizens of different states, to the

complete determination of which the state of Nebraska was not an indispensable party. If defendant's contention was correct, the action could have been originally brought in the federal court and its jurisdiction of the case was complete on removal. The circuit court was called upon to determine that question and to exercise judicial discretion in deciding it. This being so, its jurisdiction was complete, and if it erred in its conclusions the remedy is not by writ of mandamus, which cannot be used to perform the office of an appeal or writ of error. The applicable principles have been laid down in innumerable cases. *Ex parte Bradley,* 7 Wall. 364; *Ex parte Loring,* 94 U. S. 418; *In re Rice,* 155 U. S. 396; *In re Atlantic City Railroad,* 164 U. S. 633.

The court says further on page 446:

> The circuit court was called upon on this record to decide whether the state of Nebraska had any real or legal interest in the controversy alleged to have been wholly between citizens of different states; and it was a decision which the court had a right to make, involving no abuse of judicial discretion. A premature review cannot be obtained by a writ of mandamus.

The decision which the court was required to make by the record in the case at bar, was a decision which it had a right to make and which involved no abuse of judicial discretion. Mandamus is not the proper remedy.

Respectfully submitted,

NATHANIEL T. GUERNSEY,
ALONZO C. PARKER,
WILLIAM E. MILLER,
Attorneys for Respondent.

In re WINN.

APPLICATION FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE SMITH McPHERSON, DISTRICT JUDGE OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION, AND AGAINST THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

No. 12, Original. Argued April 5, 1909.—Decided May 3, 1909.

No cause can be removed from the state court to the Circuit Court of the United States unless it could have originally been brought in the latter court. *Boston Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, and *Ex parte Wisner*, 203 U. S. 449.

A suit only arises under the Constitution and laws of the United States within the meaning of § 1 of the act of August 13, 1888, c. 866, 25 Stat. 433, conferring jurisdiction on the Circuit Court when the plaintiff's statement of his own cause of action shows that it is based on those laws or that Constitution, and it is not enough that defendant may base his defense thereon. *Louisville & Nashville Railroad* v. *Mottley*, 211 U. S. 149.

Although a defendant in the state court may set up a defense based on Federal rights which will, if denied, entitle him ultimately to have the decision reviewed by this court, if the Federal question does not appear in the plaintiff's statement the case is not removable to the Circuit Court of the United States.

A writ of mandamus when issued under § 688, Rev. Stat., is for the purpose of revising and correcting proceedings in a case already instituted in the courts and is part of the appellate jurisdiction of this court, which is subject to such regulations as Congress shall make.

Mandamus will lie from this court to compel a Circuit Court to remand a case to the state court where it is apparent from the record that the Circuit Court has no jurisdiction whatever, and the writ will lie even though the party aggrieved may also be entitled to appeal or writ of error.

While mandamus never lies where the party praying therefor has another adequate remedy, an appeal or writ of error at the end of a litigation, which must go for naught, is not an adequate remedy for a plaintiff

whose case has been wrongfully removed from the state court to the Circuit Court, and held there against his protest.

The rule that mandamus will not lie to control the judicial discretion of an inferior court does not apply to an attempt of that court to exercise its discretion on subject-matter not within its jurisdiction. *In re Pollitz*, 206 U. S. 323, and *Ex parte Nebraska*, 209 U. S. 436, distinguished.

While a general appearance in the Circuit Court after removal may amount to a waiver of objection to the jurisdiction if some Circuit Court has jurisdiction of the cause, *In re Moore*, 209 U. S. 490, neither appearance nor consent can confer jurisdiction where no Circuit Court has jurisdiction of the controversy. *Ex parte Wisner*, 203 U. S. 449.

THE facts are stated in the opinion.

Mr. Guy A. Miller, with whom *Mr. W. H. Bremner* was on the brief, for petitioner:

Mandamus does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts, and to keep them within their lawful bounds. *Virginia* v. *Rives* (*Ex parte Virginia*), 100 U. S. 316; *Ex parte Wisner*, 203 U. S. 449; *Ex parte Nebraska*, 209 U. S. 436, and *Re Pollitz*, 206 U. S. 323, distinguished, because in those cases the discretionary powers necessary to defeat the issuance of the writ of mandamus were exercised in connection with matters outside the record.

Want of jurisdiction from any cause appearing on the face of the record, entitles plaintiff to a writ of mandamus where the Federal court refuses to perform the duty to remand, as these cases are outside the discretion and jurisdiction of the court. Cases *supra* and *Virginia* v. *Paul*, 148 U. S. 107.

Under §§ 1, 2, 3, of the act of March 3, 1875, 18 Stat. c. 137, as amended by the act of March 3, 1887, 24 Stat. 552, c. 373, corrected by the act of August 13, 1888, 25 Stat. 433, c. 866, an action commenced in the state court, by a citizen of another

State, against a non-resident defendant, who is a citizen of a State other than that of plaintiff, cannot be removed by the defendant into the Circuit Court, on the ground of diverse citizenship, at least where the plaintiff resists the removal. *Ex parte Wisner, supra.*

A case cannot be removed to the Circuit Court from a state court, on the ground that it arises under the laws of the United States, unless that fact appears from the plaintiff's statement of his own claim; and if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in any subsequent pleadings. *Metcalf* v. *Watertown*, 128 U. S. 586; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 453; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 453.

It is not enough that in the progress of litigation a question under those laws would arise, since that does not show that plaintiff's action derived its life from those laws. *Louisville & Nashville Railroad Co.* v. *Mottley*, 211 U. S. 149.

The suggestion on the part of the defendant that he will set up a defense or claim under the laws of the United States does not make the suit one arising under those laws. *Tennessee* v. *Union & Planters' Bank, supra; Boston & M. Con. Copper S. Min. Co.* v. *Montana Ore Pur. Co.*, 188 U. S. 632.

Were the plaintiff to admit all the allegations in petition for removal, relative to the act to regulate commerce, it would only show that the plaintiff was unable to recover, and not that this case arises under any law of the United States. *Arkansas* v. *Kansas & Texas Coal Co.*, 183 U. S. 185.

The question whether or not a shipper is entitled to recover more than the declared value of stock in a contract for interstate shipment does not present a Federal question. *Pennsylvania R. Co.* v. *Hughes*, 191 U. S. 477.

Mr. Nathaniel T. Guernsey, with whom *Mr. Alonzo C. Parker* and *Mr. William E. Miller* were on the brief, for respondent:

The jurisdiction of the Circuit Court is beyond question.

It affirmatively appears from the pleadings filed by the petitioner, Winn, that the parties are citizens of different States and that the amount in controversy exceeds the sum or value of $2,000. *Ex parte Wisner*, 203 U. S. 449, does not control, because both parties waived any objection which might have been urged to the maintenance of the suit in the Southern District of Iowa. The defendant did this by its petition for removal, general appearance, stipulation for, and filing, cost bond and for time to plead. *Construction Company* v. *Gibney*, 160 U. S. 217–220; *Re Moore*, 209 U. S. 490.

Upon the face of the plaintiff's petition, the case presented questions arising under the laws of the United States.

The character of a case is determined by the questions involved, and if it appears that the claim will be defeated by one construction of a law of the United States or sustained by the opposite construction, it is a case arising under the laws of the United States. *Starin* v. *New York*, 115 U. S. 248–257; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Bankers Casualty Co.* v. *Minn., St. P. &c. Ry. Co.*, 192 U. S. 371–380.

This doctrine does not conflict with the line of cases holding that a Federal question may not be imported into a case by the averments of the answer. Upon the face of the petition filed in the state court, the case necessarily involved the determination of whether the contract limiting the liability of the defendant to $50 is valid under the provisions of § 20 of the act to regulate commerce as amended by § 7 of the Hepburn Act, which has already been considered by the Interstate Commerce Commission, *Matter of Released Rates*, 13 Interstate Comm. Comm. 550, but has not been authoritatively determined by the courts. *Penna. R. R.* v. *Hughes*, 191 U. S. 477, having been decided prior to the Hepburn Act, is not in point.

Also whether the special contract to haul the hog in a single covered wagon is valid, it being a special service not covered by a tariff. *Wight* v. *United States*, 167 U. S. 512.

Also whether misrepresentation, by the shipper, of the value of the hog, in order to secure a lower rate, was a violation of

the act to regulate commerce; and if so, its effect upon the plaintiff's claim.

Mandamus is not the proper remedy. The determination of the motion to remand involved an exercise of judicial judgment and discretion, which must be reviewed, if at all, by appeal. *In re Pollitz*, 206 U. S. 330; *Ex parte Nebraska*, 209 U. S. 436.

MR. JUSTICE MOODY delivered the opinion of the court.

This is an application for a writ of mandamus to the District Judge of the United States, acting as Circuit Judge, for the Southern District of Iowa, Central Division. The prayer of the petition was for a rule to show cause why a writ of mandamus should not issue commanding the Judge to remand the case to the state court in which it was originally brought. The rule was issued and cause was shown by a return. From the petition and the return the following state of facts appears: The petitioner, as assignee of the right of action of a shipper, brought in a state court of Iowa, an action at law against the American Express Company for the negligent transportation of a bear, whereby the animal was killed, to the damage, it was alleged, to the owner of $8,000. The transportation was under a written contract between the owner and the defendant, which was annexed to the declaration as an exhibit. The shipment was from a point in Iowa to a point in Nebraska. The citizenship of the plaintiff or his assignor was not alleged, but the defendant was alleged to be a citizen of New York. The defendant seasonably filed in the state court a petition for removal to the Circuit Court of the United States, with accompanying bond in proper form. The petition having been denied in the state court, the defendant duly filed a copy of the record in the Circuit Court of the United States, and it was there docketed, whereupon plaintiff moved to remand the case, and the motion was denied by the Circuit Judge. The plaintiff thereupon, without further action in the Circuit Court, began this proceeding.

The petition for removal alleged that the plaintiff was a citizen of Missouri and the defendant "a joint stock association organized under the laws of the State of New York," but contained no allegation of the citizenship of the members of the association. It was agreed at the argument that the defendant was not a corporation but a joint stock association. Therefore the diversity of citizenship required to warrant a removal on that ground does not appear. The petition for removal, which is printed in the margin,[1] was not based upon diversity

[1] Your petitioner, the American Express Company, respectfully shows that it is the defendant in the above-entitled suit, and that the matter and amount in dispute in the said suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars ($2,000.00).

That your said petitioner was, at the time of the bringing of this suit, and still is a joint stock association, organized under the laws of the State of New York, in such cases made and provided, and that the plaintiff was then and still is a citizen of the State of Missouri.

Your petitioner further shows that the said suit is one of a civil nature, in which the plaintiff seeks to recover from the defendant the sum of eight thousand dollars ($8,000.00) as damages on account of an alleged failure on the part of the defendant to comply with its obligations as a common carrier in the shipment and transportation of a hog, which the assignor of plaintiff offered to the defendant and which the defendant received from the assignor of plaintiff on or about the 30th day of August, A. D. 1907, for transportation from the State Fair Grounds at Des Moines in the State of Iowa, to the city of Lincoln, in the State of Nebraska.

That the defendant denies that it failed in any respect to perform its obligations with reference to the transportation of the said hog, and denies that it is liable upon the claim set up in the said suit, in any amount, and denies that, in any event, its liability could exceed the sum or value of fifty dollars ($50.00).

That the said suit is one arising under the laws of the United States. That your petitioner is, and was, at all the times mentioned in the petition in this suit a common carrier engaged in trade and commerce between the several States of the United States, and between the Territories thereof, and between the Territories and the several States.

That at the date of the shipment in question your petitioner was, and ever since that time has been, subject to the provisions of the act of Congress, entitled "An Act to Regulate Commerce," approved February 4, 1887, and of the acts of Congress amendatory thereof and supplementary

of citizenship but upon the ground that the suit was one arising under the laws of the United States.

It is well settled that no cause can be removed from the state court to the Circuit Court of the United States unless it could originally have been brought in the latter court. *Boston &c. Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, 640; *Ex parte Wisner*, 203 U. S. 449.

The only ground of jurisdiction which is or can be suggested

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thereto, and that the alleged cause of action set up in said suit is based upon, grows out of and necessarily involves the construction of said acts of Congress. That among the questions arising under said acts and necessarily involved in said suit are—

(*a*) Whether the contract on which said suit is based is legal and enforceable by the shipper or the plaintiff as his assignee in view of the fact that it appears on the face of this contract that if the claim made in the petition as to the value of the hog in question is true, the shipper, by means of its undervaluation, violated the penal provisions of the Act to Regulate Commerce as amended.

(*b*) Whether, under the Act to Regulate Commerce, as amended, the plaintiff may assert a claim for damages in an amount in excess of the value declared by the shipper to be the true value, and, upon this declaration, made the basis of the rate for the interstate transportation in question.

(*c*) Whether, under the Act to Regulate Commerce, as amended, the provisions of the contract in suit, limiting the liability of the defendant to the sum declared by the shipper in said contract to be the actual value of the animal in question, is valid and enforceable.

(*d*) Whether, under the Act to Regulate Commerce, as amended, the plaintiff, as assignee of the shipper, is estopped to set up in this suit that the hog in question was of a greater value than the value declared to be its true value in the contract sued upon.

(*e*) Whether the undervaluation of the hog in question by the shipper in order to obtain a rate for its interstate transportation lower than the published established rate constituted a violation by the shipper of the penal provisions of the Act to Regulate Commerce, as amended.

(*f*) Whether, if said penal provisions were so violated, the plaintiff's suit is founded upon what in law is his own wrong so as to preclude a recovery by him.

(*g*) Other questions arising under said Act to Regulate Commerce, as amended.

is that the suit was one arising under the Constitution and the laws of the United States. 25 Stat. 433, 434. It is the settled interpretation of these words, as used in this statute conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough, as the law now exists, that it appears that the defendant may find in the Constitution or laws of the United States some ground of defense. *Louisville & Nashville Railroad* v. *Mottley*, 211 U. S. 149, and cases cited. If the defendant has any such defense to the plaintiff's claim it may be set up in the state courts, and if properly set up and denied by the highest court of the State may ultimately be brought to this court for decision.

Tested by these principles, the record, including the petition for removal, shows affirmatively that the case was not one arising under the laws of the United States. In substance, the allegations of the petition for removal are, that the defendant was subject to the Federal laws to regulate commerce, and that under those laws the defendant had a defense in whole or in part to the cause of action stated in the declaration. But the cause of action itself is not based upon the interstate commerce law or upon any other law of the United States. The case could not have been brought originally in the Circuit Court of the United States, and was therefore not removable thereto. In holding otherwise we think the learned Judge of the Circuit Court erred.

It is, however, argued that mandamus is not the remedy for the correction of such an error as we have pointed out, and that the aggrieved party should be left to his writ of error—a remedy which he undoubtedly has.

Authority to issue writs of mandamus to any courts appointed under the authority of the United States was given to this court by a provision in the original Judiciary Act, which now appears in § 688 of the Revised Statutes. A writ of mandamus issued under this provision is for the purpose of revis-

ing and correcting proceedings in a case already instituted in the courts, and is deemed a part of the appellate jurisdiction of this court, which is subject to such regulations as the Congress shall make. *Marbury* v. *Madison*, 1 Cr. 137; *Ex parte Yerger*, 8 Wall. 85, 97; *In re Green*, 141 U. S. 325, 326.

In *Ex parte Crane*, 5 Pet. 190, the court of its own motion considered and sustained its authority to issue mandamus to inferior courts, and in that case directed by mandamus a judge of an inferior court to sign a bill of exceptions duly presented. Since that time writs of mandamus to inferior courts have been issued in all proper cases.

In *Ex parte Bradley*, 7 Wall. 364, it was held that a mandamus from this court would lie to an inferior court of the United States, directing it to restore an attorney to the rolls who had been disbarred, where the court was without jurisdiction in that regard. And it was said, page 377: "The ground of our decision . . . is, that the court below had no jurisdiction to disbar the relator. . . . No amount of judicial discretion of a court can supply a defect or want of jurisdiction in the case. The subject-matter is not before it; the proceeding is *coram non judice* and void."

A specific application of the general principle announced in *Ex parte Bradley* has been made to cases where Circuit Courts of the United States have, without authority, assumed jurisdiction of a case originally brought in a state court, and it has frequently been held that mandamus from this court would lie to compel a Circuit Court to remand a case to the state court where it is apparent from the record that the Circuit Court has no jurisdiction whatever of the case. *Virginia* v. *Rives*, 100 U. S. 313; *Virginia* v. *Paul*, 148 U. S. 107; *Kentucky* v. *Powers*, 201 U. S. 1; *Ex parte Wisner*, 203 U. S. 449. And see *Matter of Dunn*, 212 U. S. 374. In such a situation the remedy by mandamus is available, although the aggrieved party may also be entitled to a writ of error or an appeal. Mandamus, it is true, never lies where the party praying for it has another adequate remedy. The writ of mandamus

was introduced to supplement the existing jurisdiction of the courts and to afford relief in extraordinary cases where the law presents no adequate remedy. High on Extraordinary Legal Remedies 3d ed., § 15. But where, without any right, a court of the United States has wrested from a state court the control of a suit pending in it an appeal or writ of error, at the end of long proceedings, which must go for naught, is not an adequate remedy.

In *Virginia* v. *Rives*, *supra*, the State, after the cause had been removed to the Circuit Court, filed its petition in this court for mandamus, without having made a motion to remand in the Circuit Court, but in the opinion nothing turned on the absence of a motion to remand, and the remedy by mandamus was held to exist "when the case is outside of the exercise of (judicial discretion), and outside the jurisdiction of the Court . . . to which . . . the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds," p. 323. *Ex parte Bradley* is then referred to and its discussion approved. Then followed *Ex parte Hoard*, 105 U. S. 578, where it is held that if the Circuit Court had denied a motion to remand to the state court the party aggrieved must resort to his writ of error, and that mandamus would be denied, without determining whether the case was properly removed or not. In the three following cases, however, *Virginia* v. *Paul*, *Kentucky* v. *Powers*, and *Ex parte Wisner*, *supra*, the Circuit Court had denied motions to remand (the denial of the motion in *Kentucky* v. *Powers*, appearing in the judgment of the court below, 139 Fed. Rep. 452) before the petition for mandamus was filed. Nevertheless, the writ of mandamus was issued upon the ground that it was plain as matter of law from the record itself that the Circuit Court was without jurisdiction. This must now be regarded as the settled law.

The respondent, however, insists that mandamus will not lie to control the judgment or judicial discretion of the court to which the writ is proposed to be directed. This is true

where the judgment or judicial discretion is within the limits of jurisdiction, but not otherwise. Wherever the record, including the petition for removal, shows that there are questions of fact upon whose determination the right of removal depends and upon which it is the duty of the Circuit Court to pass judicially, then there is jurisdiction to decide those questions. Their decision is the exercise of judicial discretion, and if that discretion is erroneously exercised it can be corrected only by a writ of error or appeal. In these cases writs of mandamus must not be permitted to usurp the functions of writs of error or appeals or take their place where they offer an adequate remedy to the aggrieved party. It is only in cases where the record makes it clear, as matter of law, that the Circuit Court was without jurisdiction to take any action whatever that the writ of mandamus lies. This distinction has been acted on many times by this court, and it is enough to refer to two very recent cases. Thus where the removability of a case turned upon the question whether there was a separable controversy, to the trial of which certain of the defendants were not indispensable or necessary parties, it was held that the Circuit Court had jurisdiction to determine the question of separability; that its decision in that respect was the exercise of judicial discretion and could not be controlled by a writ of mandamus. *In re James Pollitz*, 206 U. S. 323. The same point was decided in *Ex parte Nebraska*, 209 U. S. 436. In each of these cases a distinction was made between it and a case where on the face of the record absolutely no jurisdiction has attached, and the right to a writ of mandamus in the latter case was affirmed.

As we have shown, the want of jurisdiction of the Circuit Court appears clearly on the record in the case at bar, and does not, as in *In re Pollitz* and *Ex parte Nebraska*, depend upon findings of fact which the Circuit Court had jurisdiction to make. We think, therefore, it is clear that the writ of mandamus ought to issue.

A subordinate question must receive some attention. It is said that the petitioner in this case appeared generally in the

Circuit Court after the removal of the case, and thereby waived his right to object to the jurisdiction, and *In re Moore*, 209 U. S. 490, is cited in support of the position. But that case simply held that where there was a diversity of citizenship, which gave jurisdiction to some Circuit Court, the objection that there was no jurisdiction in a particular district might be waived by appearing and pleading to the merits, and anything to the contrary said in *Ex parte Wisner*, 203 U. S. 449, was overruled, though the *Wisner case* was otherwise left untouched. See *Western Loan Co.* v. *Butte & Boston Mining Co.*, 210 U. S. 368, 369. Here, however, is a case where, upon its face, no Circuit Court of the United States had jurisdiction of the controversy, originally or by removal. In such a case the consent of the parties cannot confer jurisdiction. *Louisville & Nashville R. R.* v. *Mottley*, 211 U. S. 149, and cases cited.

The rule is made absolute and the writ of mandamus awarded.